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ORIGINAL NO. 2 OCTOBER TERM, 1915.

IN THE

# Supreme Court of the United States

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COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, Defendant.

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## BRIEF OF WEST VIRGINIA IN OPPOSITION TO VIRGINIA'S MOTION FOR AN EXECUTION.

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A. A. LILLY,
Attorney General
of West Virginia.

JOHN H. HOLT,
Special Counsel for
State of West Virginia.

June 1, 1916.

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### STATEMENT OF CASE.

This Court entered a decree on the 14th day of June, 1915, in an equity cause originally instituted therein by the Commonwealth of Virginia against the State of West Virginia, in favor of the former and against the latter State, for the sum of

$12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per centum per annum.

On the 19th day of October next following the entry of the decree, the Chairman of the Virginia Debt Commission addressed a letter to the Governor of West Virginia, requesting that provision be made for its payment, and calling attention to the fact that legislative action upon the part of West Virginia would be necessary, and that, as that body would not meet in regular session until January, 1917, suggested that the Governor convene that body in extraordinary session, for the purpose of dealing with the subject and making provision for the payment of the decree without unreasonable delay (letter of Chairman of Virginia Commission to Governor of West Virginia, page 5 of Petition for Execution).

On the 28th day of the same month, the Governor of West Virginia replied to the Chairman of the Virginia Debt Commission, acknowledging the receipt of his letter, and stating that he had convened the West Virginia Debt Commission, and had, in conjunction with them, reached the conclusion that it would be to the advantage of both States to have a joint conference of the two Commissions at the earliest date possible (petition for writ, page 6).

Upon the 12th of November, 1915, Mr. Downing, Chairman of the Virginia Debt Commission, replied, upon instruction from his Commission, that they would be pleased to meet the West Virginia Commission, and suggested the 23rd day of November, 1915, as the time, and the City of Washington as

the place for such a conference (petition for writ, page 7).

To this letter the Governor replied by telegram, stating that he would further communicate with the Chairman of the Virginia Debt Commission just as soon as he had had an opportunity to hear from the other members of the West Virginia Commission (petition, page 8); and, by another telegram dated the 19th day of November, stated that he would be unable to arrange a meeting for the 23rd of November, and would probably not be able to arrange such meeting before sometime early in December (petition, page 8). On December 6, 1915, the Chairman of the Virginia Commission, having heard nothing further from the Governor of West Virginia, wrote him another letter, reminding him of his telegram of November 19th, and expressing the hope that he might hear from him at an early date (petition, page 9).

The Virginia Commission having received no reply to this last letter of its Chairman, Mr. Downing, a notice, signed by the Attorney General of Virgina, was served upon the Attorney General for West Virginia on the 15th day of May, 1916, to the effect that the State of Virginia would, on the 5th day of June, 1916, move this Court for a writ of execution against the State of West Virginia, directing the Marshal of said Court to levy upon the property of the State of West Virginia subject to such levy for the satisfaction of the decree and judgment aforesaid, and a petition has been presented in support of said motion, setting forth the correspondence hereinbefore outlined.

West Virginia has filed her answer to the motion, wherein she insists that the execution should not be issued as prayed for the following reasons:

> "1. Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this Court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her Legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen.
>
> 2. Because not only presumptively, but in fact, the State of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution.
>
> 3. Because Section 2 of Article III. of the Federal Constitution, conferring jurisdiction upon this Court to determine 'controversies between two or more States', simply referred to the judiciary the settlement of the questions of law and fact involved in such controversies, and the determination,

> in the form of a judgment, of the rights of the sovereign parties, with the implication that the defeated commonwealth would, in good faith, accept and abide by the judgment so rendered, and voluntarily provide for its satisfaction, and does not make such judgments compulsory, but only persuasive, where they are for money without collateral security, because not enforceable by execution against public property, or by mandamus infringing the taxing power of the States reserved by the Constitution."

Each of these objections to the writ will be briefly discussed in its order.

## ARGUMET.

### I.

### WEST VIRGINIA SHOULD BE GIVEN AN OPPORTUNITY TO ACCEPT AND ABIDE BY THE DECREE OF THIS COURT, AND TO PROVIDE IN REGULAR COURSE FOR ITS PAYMENT, BEFORE ANY STEPS LOOKING TO HER COMPULSION BE TAKEN.

The State of West Virginia could, and can, only provide for the satisfaction of this decree through the action of the legislative branch or department of her government, and that body has not been in session since the rendition of this decree, and will not convene again in regular course under the present Constitution of the State until the second

Wednesday in January, 1917, a period of seven months hence (Sec. 18, Art. VI., Constitution W. Va., 1872). West Virginia, therefore, has had no opportunity, prior to the motion now made and pending, to accept and abide by the decree of this Court, and it will not be presumed that she will repudiate the same and refuse to make payment when her Legislature does meet. Under such circumstances, therefore, it is respectfully submitted that the writ of execution should be denied, and the State of West Virginia given an opportunity, at least, to perform her obligations under the Constitution.

Mr. Chief Justice Fuller, speaking for this Court upon the demurrer to the bill in this case, used the following language:

> "The object of the suit is a settlement with West Virginia, and to that end a determination and adjudication of the amount due by that State to Virginia; and when this Court has ascertained and adjudged the proportion of the debt of the original State which it would be equitable for West Virginia to pay, it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this Court. *If such repudiation should be absolutely asserted, we can then consider by what means the decree may be enforced.* Consent to be sued was given when West Virginia was admitted into the Union, *and it must be assumed that the Legislature of West Virginia would, in the natural course, make provision for the satisfaction of any decree that may be rendered.*" (Italics ours.)

Commonwealth of Virginia v. State of W. Va., 206 U. S., 319; 51 L. Ed., 1080.

Again we have the same just and orderly position taken by this Court in the earlier case of Rhode Island v. Massachusetts, wherein Mr. Justice Baldwin, speaking for a majority of the Court says:

> "This Court cannot presume, that any State which holds prerogative rights for the good of its citizens, and by the Constitution has agreed that those of any other State shall enjoy rights, privileges and immunities in each, as its own do, would either do wrong or deny right to a sister State or its citizens, or refuse to submit to those decrees of this Court, rendered pursuant to its own delegated authority."
>
> Rhode Island v. Massachusetts, 12 Peters, 751; 9 L. Ed., 1271.

It is true that the Governor, under Sec. 19 of Art. 6 of the W. Va. Constitution, "may convene the Legislature by proclamation whenever, in his opinion, the public safety or welfare shall require it"; but such a step could scarcely be taken with convenience and propriety pending the present primaries in the State, or pending the resulting elections that follow in November, and, after that time, there will be a new Legislature to deal with, whose regular biennial session will follow in three months. In any event, the action of the Governor the one way or the other would not be the action of the Legislature, and no inference may be drawn in relation thereto from his conduct.

## II.

## NOT ONLY PRESUMPTIVELY, BUT IN FACT, THE STATE OF WEST VIRGINIA DID NOT HAVE AT THE TIME OF THE RENDITION OF THE DECREE HEREIN, AND DOES NOT NOW OWN, ANY P ROPERTY, EXCEPT SUCH PROPERTY AS WAS AND IS DEVOTED EXCLUSIVELY TO PUBLIC USE, AND NONE OF THE PROPERTY SO DEVOTED MAY BE LEVIED UPON OR SOLD UNDER EXECUTION.

This Court, as well as the Courts of last resort of the States, has uniformly held that neither the public revenues nor any property, real or personal, devoted to public use, and constituting a part of the machinery of government, may be levied upon or sold on execution.

Klein v. City of New Orleans, 98 U. S., 149; 25 L. Ed., 430.
City of New Orleans v. La. Construction Co., 140 U. S., 654; 35 L. Ed., 556.
Meriwether v. Garrett, 102 U. S., 472; 26 L. Ed., 197.
Carter v. State, 42 La. Ann., 927; 21 Am. St. Rep., 404.

It may be answered, however, that the question whether or not the State of West Virginia has any property which is not devoted to public use, and which would be subject to execution, should be determined upon or by the return of the writ, and not upon the application for the *fieri facias;* and this contention would probably be true upon an applica-

tion for an execution against an individual; but there is a plain distinction to be observed between an individual and a State upon such an application. In the case of an individual, the presumption is that all property owned by him is held to his private use, and subject to the payment of his debts; but, in the case of a State, the presumption is the exact reverse, and the onus or burden to show the contrary is upon the plaintiff in execution.

Curry v. Savannah, 64 Ga., 294; 37 Am. Rep., 74.

Under such circumstances, therefore, in the face of this presumption, and especially in the presence of the allegation in the answer that not only the presumption but the fact is that all of the property of the State of West Virginia in *locus publicus*, should there be, in the first instance, a showing to the contrary, if possible, to the end that the Court may not do a vain and idle thing.

## III.

## A MERE MONEY JUDGMENT RENDERED BY THIS COURT AGAINST A STATE WAS NOT INTENDED, UNDER SEC. 2 OF ARTICLE III. OF THE FEDERAL CONSTITUTION, TO BE COMPULSORY, BUT PERSUASIVE.

It should be expressly stated at the outset that it is not intended, in this or any other connection, to argue, directly or indirectly, against the jurisdiction of this Court over the present controversy. That question is behind us. Such jurisdiction has

been rightly and inevitably assumed, and carried, with the usual learning and courtesy of this Court, into final judgment; but the Court's attention will be called to the character, effect and consequence of that judgment under the Constitution and the decisions of this Court.

The contention is that Sec. 2 of Article III. of the Federal Constitution, conferring jurisdiction upon this Court to determine "controversies between two or more States", simply referred to the judicial department of the government the settlement of the questions of law and fact involved in such controversies, and the determination, in the form of a judgment, of the rights of the sovereign parties, with the implication that the defeated commonwealth would in good faith, accept and abide by the judgment so rendered, and voluntarily provide for its satisfaction, and does not make such judgments compulsory, but only persuasive, especially where they are for money without collateral security, because not enforceable by execution against public property, or by mandamus infringing the taxing power of the States reserved by the Constitution.

It will be borne in mind that this Court, speaking in this case through Mr. Justice Holmes, has announced that "the case is to be considered in the untechnical spirit proper for dealing with a *quasi* international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the Legislature of either State alone" (Va. v. W. Va., 220 U. S., 27; 55 L. Ed., 357); and it is needless to add that neither international nor *quasi*

international controversies, although settled and reduced to the form of a judgment or award by a tribunal of their concurrent selection, result in writs of execution.

Alexander Hamilton, one of the framers of the Constitution, and one of the strongest advocates of its adoption, clearly held this view. In presenting the Constitution to the people of New York, he says, in the 81st number of the Federalist:

> "There is no color to pretend that the State Governments would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint, but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done, without waging war against the contracting State; and to ascribe to the Federal Courts, by mere implication, and in destruction of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

It is true that he was speaking of suits by individuals against States; but the reasoning, so far as the enforcement of a judgment against a State is concerned, is equally applicable to a suit by a

State against a State. And Chief Justice Marshall, in Cohens v. Virginia, 6 Wheaton, 418, tells us that:

> "The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our Constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the Constitution put it very much in their power to explain the views with which it was framed."

The views of Mr. Webster to the same effect as those expressed in the Federalist were quoted with approval by Mr. Justice Bradley in the case of Hans v. State of Louisiana, 134 U. S., 1; 33 L. Ed., 842, as follows:

> "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."
>
> 6 Webster's Works, 537.

To like effect is the reasoning and conclusion of this Court in *ex parte* Kentucky v. Dennison, 24 How., 66; 16 L.Ed., 717. There paragraph two of Sec. 2 of Article IV. of the Federal Constitution, requiring the executive authority of one State to de-

liver up on demand fugitives from justice, and the Act of Congress of 1793, providing the regulations necessary to the execution of such constitutional provision, were construed, and the extent of their force defined. One Willis Lago, indicted in the State of Kentucky for a crime under the laws of that State, fled into the State of Ohio, and a requisition issued by the Governor of Kentucky, under the constitutional provision and Act of Congress aforesaid, upon the Governor of Ohio for his return was denied. Thereupon, the State of Kentucky instituted a mandamus proceeding in the Supreme Court of the United States against the Governor of Ohio, asking that the latter be compelled to obey the requisition; and, although this Court assumed jurisdiction, and held that mandamus was the proper proceeding, if there were any remedy at all applicable to the controversy, it denied the writ, upon the ground that the constitutional provision and the Act of Congress aforesaid only appealed to the moral duty and fidelity of the States, and did not provide "any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power"; and Mr. Chief Justice Taney, who delivered the opinion of the Court, concluded the same with the following language:

> "And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest

would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled."

See also Louisiana v. Jummel, 107 U. S., 711;
Rees v. Watertown, 19 Wallace, 107;
Heine v. Levee Comrs., 19 Wallace, 655.

It is true that West Virginia, like the original thirteen Colonies when they adopted the Constitution, consented at the time of her admission into the Union to be sued in this Court by another State; but the power to satisfy the judgment rendered in any suit by execution cannot be implied from such consent. The general doctrine is well illustrated by the case of Carter v. State, 42 Louisiana Annual, 927; 21 Am. St. Rep., 404, wherein the second paragraph of the syllabus reads as follows:

"Statute authorizing suit against State has no effect beyond referring to the judi-

> ciary, for settlement, the questions of law and fact involved in the claims, and the determination, in the form of a judgment, of the rights of the parties. It does not authorize a seizure of State property to satisfy such judgment, and only conveys an implication that the legislature will recognize such judgment as final, and make provision for the satisfaction thereof."

If this be true, it may then be asked, why should the Constitution confer jurisdiction to render judgment against a State, but withhold the power to execute the judgment when rendered? This apparent anomaly is not unknown to the common law, even in the case of controversies between individuals and a State, and, in the case of controversies between States, where natural equity and the rules of international law, rather than of any municipal code, prevail, the same situation is universal.

Time immemorially certain of the English Courts have had jurisdiction to entertain claims against the Crown upon petitions of right, but no execution, in the event of judgment, was ever issued. The questions of law and of fact involved in the controversy were passed upon by the Court exercising jurisdiction, and reduced to the form of a judgment; but the satisfaction thereof was always left to Parliament, and it might or might not pay the debt. In other words, the judgment so rendered was not compulsive, but persuasive.

Macbeth v. Haldimand, 1 Term Rep., 172.

And, when we come to a controversy between two States of the American Union, it will be borne

in mind that the adoption of the Federal Constitution destroyed and put an end to all diplomatic relations betwen the individual States, and it became necessary to establish by that Constitution a high tribunal for the settlement of all controversies between them; but it cannot be supposed, in the absence of express sanctions, that it was the intention to press the judgments of that tribunal beyond the analogies of international law, or to enable it to destroy by compulsory process any of the sovereignties expressly retained by the States.

Neither does the case of South Dakota v. North Carolina, 192 U. S., 286; 48 L.Ed., 448, militate against this view. In that case, the State of North Carolina issued certain State bonds, and secured their payment by a mortgage upon certain railroad stocks owned by her. Afterwards, the State of South Dakota became the owner of certain of these bonds, either through gift or purchase; and, when North Carolina refused to pay them, brought suit to compel payment of the bonds and the subjection of the mortgaged property to the satisfaction of the debt. A decree was entered for the amount of the bonds, and, in default of payment, for the sale at public autcion of the railroad stocks that had been pledged for their payment. No property devoted to governmental purposes was involved or sold. It was like the case of a note or bond secured by the delivery of collateral, and, when default was made in the former, the latter was taken in satisfaction; and this Court did not go on and enter judgment for the amount of any deficiency that might remain after the collateral had been exhausted.

Indeed, the question here presented was expressly reserved in that case for future decision, as will appear from the following language used by Mr. Justice Brewer in delivering the majority opinion of the Court:

> "We have, then, on the one hand the general language of the Constitution, vesting jurisdiction in this court over 'controversies between two or more States', the history of that jurisdictional clause in the convention, the case of Chisholm v. Georgia, U. S. v. N. Carolina, and U. S. v. Michigan (in which this Court sustained jurisdiction over actions to recover money from a State), the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question, it is directly presented, and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties."

A decree of the character entered in the case of South Dakota v. North Carolina would not attack the sovereignty of the State; but a writ of execution to be levied upon the public property of the State, or the

appointment of a receiver to take charge of and appropriate its public moneys, or a commission to extend and collect taxes upon the private property of its citizens, or the issuance of a mandamus to compel or control the exercise of the taxing power of her legislature, either one or all, would cut up by the roots a portion of the very sovereignties that were expressly reserved to the States in the Tenth Amendment to the Constitution.

It is true that this Court held in Wayman v. Southard, 10 Wheaton, 1, that jurisdiction once conferred does not end with the rendition of judgment, but covers final, as well as original, process; and, while this is unquestionably true in ordinary cases, it has no application to the jurisdiction here conferred. The distinction between individuals and States must be observed, as well as the immemorial practice of Courts in dealing with the latter. A jurisdiction extended to controversies between States is not such [redacted] jurisdiction, to borrow the language of Judge Fenner in Carter v. State, 42 Louisiana Annual, 927, as carries with it "the incidents and appurtenances of ordinary jurisdiction."

Mr. Justice Miller, in concluding his opinion in the case of Heine v. Board of Levee Comrs., 19 Wallace, 655, made use of the following language:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us, the national sovereignty has nothing to do with it. The power

must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the Court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

Also this Court in Rees v. Watertown, 19 Wallace, 107, said:

"We are of the opinion that this Court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only, and, second, by the power of legislative authority only. It is a power that has not ben extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

The last two cases cited were bills in equity, the first asking that the Levee Commissioners be compelled to levy a tax for the payment of certain bonds, and the second asking the Court to levy such a tax through its own officers, and, although the Court held in each instance that a court of equity had no jurisdiction in the premises for any such purpose, yet it is easy to perceive that the reasoning as embodied in the above expressions would be equally applicable to a writ of mandamus in the nature of an execution, if applied for against a State, as distinguished from one of its corporate subdivisions to which have been delegated the power to levy taxes for the payment of its debts.

Respectfully submitted,

A. A. LILLY,
Attorney General
of West Virginia.

JOHN H. HOLT,
Special Counsel for
State of West Virginia.

June 1, 1916.

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IN THE

# Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, Defendant.

## ANSWER AND RETURN OF THE STATE OF WEST VIRGINIA TO THE PETITION AND MOTION OF THE COMMONWEALTH OF VIRGINIA FOR A WRIT OF EXECUTION UPON THE JUDGMENT HEREIN.

A. A. LILLY,
Attorney General
of West Virginia.

JOHN H. HOLT,
Special Counsel for State
of West Virginia.

ORIGINAL NO. OCTOBER TERM, 1915.

IN THE

# Supreme Court of the United States

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COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, Defendant.

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ANSWER AND RETURN OF THE STATE OF WEST VIRGINIA TO THE PETITION AND MOTION OF THE COMMONWEALTH OF VIRGINIA FOR A WRIT OF EXECUTION UPON THE JUDGMENT HEREIN.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of West Virginia, in response to the motion herein, respectfully asserts that the writ of execution prayed by the Commonwealth of Virginia should not be issued, for the following reasons and upon the following grounds:

1. Because the State of West Virginia, within herself, has no power to pay the judgment in ques-

tion, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this Court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her Legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen.

2. Because not only presumptively, but in fact, the State of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution.

3. Because Sec. 2 of Article III. of the Federal Constitution, conferring jurisdiction upon this Court to determine "controversies between two or more States", simply referred to the judiciary the settlement of the questions of law and fact involved in such controversies, and the determination, in the form of a judgment, of the rights of the sovereign parties, with the implication that the defeated commonwealth would, in good faith, accept and abide by the judgment so rendered, and voluntarily provide for its satisfaction, and does not make such judgments compulsory, but only persuasive, where they are for money without collateral security, because

not enforceable by execution against public property, or by mandamus infringing the taxing power of the States reserved by the Constitution.

WHEREFORE, this respondent, the State of West Virginia, prays judgment that the writ of execution, sought, as aforesaid, by the Commonwealth of Virginia against her, be denied, and that she be dismissed from further answer to said petition and motion, with her reasonable costs in this behalf expended.

STATE OF WEST VIRGINIA,

By

A. A. LILLY,
Attorney General
of West Virginia.

JOHN H. HOLT,
Special Counsel for State
of West Virginia.

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# Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia.

## MOTION OF WEST VIRGINIA AND OTHER RESPONDENTS TO DISCHARGE THE RULE IN MANDAMUS HEREIN.

# Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia.

MOTION TO DISCHARGE AND RETURN TO THE RULE ISSUED HEREIN ON THE 5TH DAY OF FEBRUARY, 1917, ORDERING THAT CAUSE BE SHOWN ON THE 6TH OF MARCH, 1917, BY THE RESPONDENTS WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE AGAINST THEM AS PRAYED IN THE PETITION OF THE RELATOR.

And now come the respondents, the State of West Virginia and Wells Goodykoontz, President of the West Virginia Senate, et al., being all the mem-

bers of said Senate, and Joseph S. Thurmond, Speaker of the House of Delegates of the State of West Virginia, et al., being all the members of said House of Delegates, and move to quash the rule awarded against them at the prayer of the Commonwealth of Virginia upon the 5th day of February, 1917, ordering them to show cause before this Court on the 6th day of March, 1917, why a writ of mandamus should not issue against them as prayed, and assign as grounds of said motion the following:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.

4. It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and

subject property already in existence for that purpose.

And now, by leave of Court, these respondents, without waiving their motion to discharge said rule, or any of the grounds assigned in support thereof, make further return thereunto as follows:

I. They deny, as charged in the tenth paragraph of the petition of the relator, that it was the absolute ministerial duty of the Legislature of the State of West Virginia, and of the members of her Senate and House of Delegates, upon the convening of said Legislature on January 10, 1917, to take the necessary steps and make the necessary enactments providing for the payment of the judgment in favor of the State of Virginia against the State of West Virginia, and described in said petition. On the contrary, they say that their duties in the premises, and under the 8th Section of the 8th Article of the Constitution of West Virginia of 1863, were, and are, not ministerial, but legislative, deliverative and discretionary; and they further say that, instead of omitting or neglecting their duty as charged in the petition, upon the convening of the Legislature on January tenth, or shortly thereafter, the Senate and House of Delegates, each for itself, appointed a committee, with authority to hear arguments, report upon resolutions and recommend appropriate measures looking to the settlement of the judgment rendered at the suit of Virginia against West Virginia, which committees were ready to begin their sittings and to enter upon their work at the time of the presentation of the petition of the relator to

this Court; but that since said time, and in consequence of said petition and the rule ordered thereon upon the 5th day of February, 1917, all matters relating to the settlement of said judgment have been suspended and held in abeyance, except that, on the 21st day of February, a joint resolution was adopted by both houses of the Legislature, directing the Attorney General of the State and associate counsel to make appearance and defense, in the name and on behalf of the State of West Virginia and the Several members constituting the Senate and House of Delegates thereof, to the rule in mandamus issued herein; and said resolution further provided that, in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon said rule, whether its judgment be for or against the State of West Virginia, the Governor is requested to convene the Legislature in special session as soon as may be for the purpose of doing without delay what should be done in the premises.

A copy of said resolution is filed herewith as a part hereof.

II. Further answering, these respondents say that they are advised that the writ of mandamus is a discretionary writ, and that this Court will exercise its discretion against the issuance thereof if to issue the same would give an undue advantage to the relator, or operate unjustly against the respondents; and they say that it should not be issued in this case for the following reasons:

These respondents are informed and believe, and upon such information and belief say, that the

State of Virginia has a claim against the Government of the United States for many millions of dollars, which should be collected, and, when collected, that the State of West Virginia should participate therein in the same ratio that she, the State of West Virginia, is compelled by the judgment of this Court to contribute to the payment of Virginia's *ante bellum* debt; that is to say, she should be paid out of said claim by the State of Virginia 23½% thereof.

And they further say that they are advised that the State of Virginia alone can take steps for the collection of said claim, and are informed that Virginia has taken no such steps, but has to the present time withheld, and still withholds, from any effort to reduce this common asset to possession, and yet seeks to compel the State of West Virginia to pay her proportion of the common debt, and thus denies her the opportunty to share in the common assets.

They further say that the equity aforesaid was not passed upon by this Court in the settlement of the controversy between Virginia and West Virginia, and could not have been, because the United States was not a party thereto, and could not have been, but that the State of Virginia could have theretofore impleaded the United States in the Court of Claims upon the claim aforesaid, and reduced the same to possession, so that West Virginia could have asserted, and this Court could have allowed, her right to participation therein, but she did not, but then failed and refused, and still fails and refuses, so to do.

These respondents further say that the origin,

nature and history of the claim aforesaid is as follows:

Prior to the adoption of the articles of confederation entered into by the thirteen original States, Maryland refused to sign the same, unless and until those States holding western territory should surrender the same to the United States. The State of Virginia at the time laid claim to all that territory lying northwest of the Ohio River out of which the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota have since been formed; and, by an Act of her General Assembly passed at a session commencing on the 20th day of October, 1783, and for the purpose of expediting the establishment of the proposed confederation, authorized her delegates in Congress to convey to the United States in Congress assembled all her territory northwestward of the Ohio River, and, on the first day of March, 1784, her delegates in Congress, consisting of Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, and pursuant to the Act of October 20, 1783, presented a deed to Congress ceding all the territory of Virginia northwestward of the Ohio River to the United States, upon certain terms, conditions and trusts therein set forth, which deed of cession was accepted according to its terms, and directed to be recorded and enrolled among the Acts of the United States in Congress assembled. Among the conditions set out in the deed and accepted by Congress was the following:

> "(F) That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to,

any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It further appears from the requisitions made by Congress upon the thirteen States at the time of this cession that Virginia's "usual respective proportion in the general charge and expenditures" was about one-seventh of the whole; and it seems to be also conceded that the moneys derived from the sale of the lands embraced in this cession were to be applied to the extinguishment of the public debt incurred in the War of the Revolution, which debt was finally paid; so that, after this part of the trust had been met, and certain other conditions of the deed had been performed, the residue of the trust fund should have been applied to the reserved interests of the States set forth in Article (F) of the deed, Virginia included, and to "no other use or purpose whatsoever." Instead of doing this, however, Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms.

The total acreage embraced, according to gov-

ernment surveys, in the cession amounted to 170,208,613 acres, and out of this Congress seems to have donated to local uses, contrary to the deed, 38,864,189 acres, which, valued at $2 per acre, the price fixed by Congress when these lands were offered for sale by the Act of May 18, 1796, would amount to $77,728,378. In addition to this, proceeds of the sales of lands amounting to $2,953,654.70 were likewise donated to local uses, making an aggregate of donations contrary to the deed of $80,682,032.70.

In addition to this, their information is that the trust has not even yet been entirely administered, but that there remains on hand undisposed of several thousand acres of these lands; and, not adding the value of these to the value of the local donations above ascertained, and allowing unto Virginia one-seventh thereof as her residuary interest in the trust, there would be due and payable from the Government of the United States to the State of Virginia the sum, at the least, of $12,000,000, in which West Virginia should share in the same ratio that she is compelled to contribute to the payment of Virginia's debt; that is to say, she should receive 23½% thereof.

The foregoing epitome of said claim is based upon information and belief, and, in support thereof, a copy of the message of Governor Swanson of Virginia to the General Assembly of that State, and dated January 24, 1910, is exhibited herewith as a part of this return.

WHEREFORE, said respondents, and each of them, pray that said rule may be discharged, and the peremptory writ of mandamus denied.

STATE OF WEST VIRGINIA,

Wells Goodykoontz, Pres. W. Va. Senate,
Benj. L. Rosenbloom, Senator,
Elmer Hough, "
W. H. Carter, "
W. F. Burgess, "
Robert L. Gregory, "
M. K. Duty, "
Warren Miller, "
Raymond Dodson, "
W. P. McAboy, "
J. E. Frazier, "
J. W. Luther, "
W. P. Hawley, "
C. C. Coalter, "
Martin V. Godbey, "
A. R. Montgomery, "
Gory Hogg, "
H. G. Vencill, "
E. H. Morton, "
Fred L. Fox, "
Scott C. Lowe, "
Chas. A. Sinsel, "
Roy E. Parrish, "
Wallace B. Gribble, "
Richard E. Talbott, "
Gohen C. Arnold, "
S. O. Billings, "
S. L. Cobun, "
Frank Beckwith, "
G. K. Kump, "

Joseph S. Thurmond, Speaker House of Delegates of W. Va.,
Clyde Poling, Member House Delegates,
Harry P. Henshaw, "
John N. Parks, "
Luther R. Jones, "
Lee Rader, "

L. T. Harvey, Member House Delegates,
T. J. Mahan, "
W. C. W. Renshaw, "
John L. Connor, "
A. J. Baxter, "
W. N. Clay, "
Kenna Lester, "
Paul Hardman, "
A. K. Fleming, "
J. Alfred Taylor, "
Charles J. Massau, "
Geo. H. Scaggs, "
J. Wilbur Davis, "
E. E. Cottrell, "
P. A. Dixon, "
A. B. C. Bray, "
W. W. Carder, "
J. Ness Porter, "
J. D. Chipley, "
S. R. Harrison, Jr., "
John Moore, "
George W. Sturm, "
Louis A. Johnson, "
Kenna Casto, "
Everett Hughes, "
Milton Burr, "
L. V. Koontz, "
J. F. Bouchelle, "
Angus W. McDonald, "
John Patrick, "
O. F. Payne, "
A. W. Price, "
James Bassel, "
Charles Cabell, "
Robert Bland, "
Ira A. Akins, "
Frank C. Haymond, "
E. O. Murray, "
C. H. Hunter, "

George W. Byrnes, Member House Delegates,
Pat. M. Wilson, "
W. D. Curry, "
R. B. Ferguson, "
W. B. Honaker, "
A. F. Wysong, "
S. N. Moore, "
Joseph B. Straton, "
Wm. S. John, "
Perry C. McBee, "
Clarence Symns, "
W. H. Somers, "
Harvey Hagerman, "
E. Howard Harper, "
J. Buell Swope, "
Floyd Waldron, "
W. G. Graves, "
J. E. Emsley, "
W. T. Otto, "
Harry A. Weiss, "
N. Price Whitaker, "
G. A. Hiner, "
Gilbert D. Smith, "
B. M. Yeager, "
W. H. Glover, "
Leroy Shaw, "
C. W. Taylor, "
C. L. Heaberlin, "
V. E. Sullivan, "
E. H. Arnold, "
James W. Weir, "
B. R. Twyman, "
A. M. Hersman, "
G. T. Sarver, "
A. A. Riddlebarger, "
J. Sidney Burdett, "
H. R. Werner, "
F. R. Hickman, "
John B. Hilleary, "

W. K. Ferguson, "
F. W. Terrill, "
W. T. Talbott, "
Septimus Hall, "
J. Friend Alley, "
S. F. Wells, "
W. D. Price, "
P. F. Wells, "
John D. Sweeney, "
A. J. Mullens, "

By E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.

DISTRICT OF COLUMBIA, to-wit:

Joseph S. Miller, being duly sworn, says that he is a member of the "New Virginia Debt Commission" of the State of West Virginia, charged under the law of said State with the defense of this proceeding, and that he has read and is familiar with the allegations of the foregoing return, and that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information he believes them to be true.

.....

Taken, subscribed and sworn to before me this .....day of March, 1917.

.....,

.....

# WEST VIRGINIA LEGISLATURE.

## SENATE JOURNAL

## REGULAR SESSION, 1917.

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Charleston, W. Va.,
Wednesday, February 21, 1917.

Mr. Miller offered the following:

SENATE JOINT RESOLUTION No. 20.—

"WHEREAS, The Supreme Court of the United States, at the suit of the Commonwealth of Virginia vs. the State of West Virginia, on June 14, 1915, entered a judgment in favor of the Commonwealth of Virginia against the State of West Virginia for $12,393,929.50 with interest thereon from July 1, 1915, until paid, at the rate of 5 per cent. per annum, and

WHEREAS, The Senate and the House of Delegates has each for itself, at the first regular session of the Legislature which convened after the rendition of said judgment, appointed a committee with authority to hear arguments, pass upon resolutions and recommend appropriate measures looking to a settlement of the judgment aforesaid, and

WHEREAS, The Commonwealth of Virginia, not content to await the action of the Legislature in the premises, has seen fit to appear before the Supreme Court and sue out a rule in mandamus directed to the entire membership of each branch of the Legislature, requiring the members thereof

forthwith and at the present session, to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment, with interest thereon until paid, or make provision for the payment thereof by an issue of bonds, or else to appear at the bar of the Supreme Court on the 6th day of March next, and show cause why such action should not be taken, and

WHEREAS, This Legislature upon the challenge of its constitutional rights thus made by the Commonwealth of Virginia and upon the advice of the Attorney General and special counsel duly appointed by the New Virginia Debt Commission, authorized and empowered so to do, feels that it should suspend further action and leave the further consideration of the Virginia Debt in abeyance until the Supreme Court shall have disposed of said mandamus proceeding, and that it should defend against said rule; be it, therefore

RESOLVED BY THE SENATE, THE HOUSE OF DELEGATES CONCURRING THEREIN:

FIRST,—That the Attorney General of the State, with the assistance of special counsel retained by the New Virginia Debt Commission for the purpose, be authorized and directed to appear to and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof, and the several senators and delegates constituting the membership of its respective bodies.

SECOND,—That in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon the mandamus, the

Governor is requested, whether that judgment be for or against the State of West Virginia, to convene the Legislature in special session, as soon as may be, for the purpose of doing without delay what should be done in the premises."

On motion of Mr. Miller, the rules were suspended and the resolution was taken up for immediate consideration, read by the Clerk, and adopted.

SENATE DOC. No. III.

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COMMUNICATION

from the

GOVERNOR OF VIRGINIA

transmitting

CERTAIN CORRESPONDENCE AND REPORTS IN REFERENCE TO THE CLAIM OF VIRGINIA AGAINST THE UNITED STATES GOVERNMENT ON ACCOUNT OF THE CESSION OF THE NORTHWEST TERRITORY.

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COMMONWEALTH OF VIRGINIA,

GOVERNOR'S OFFICE,

Richmond, Va., January 24, 1910.

TO THE GENERAL ASSEMBLY OF VIRGINIA:

Superintendent of Public Instruction Hon. J. D. Eggleston, and Dr. Robert B. Fulton, superintendent of the Miller School, have called to my attention

a large claim which the State of Virginia has against the Federal government arising from the cession to the United States of the vast territory once possessed by this Commonwealth north of the Ohio river. Dr. Fulton has, at the request of Superintendent Eggleston and myself, for some time been making a thorough investigation of this matter, and has compiled a complete and detailed statement of this claim, which appears to establish its justice and legality, and imposes upon me the duty of transmitting the facts and information obtained by him to you for consideration and action.

Prominent Virginians, including Commodore Maury and Superintendent of Public Instruction Dr. William H. Ruffner, have presented in writings and reports this claim of the State of Virginia.

Succinctly stated the claim presented is as follows:

The vast territory north of the Ohio was included in Virginia's original charter of 1609, which charter was prior to the charter of any other State, and which territory was included in the boundaries of Virginia when she asserted her independence and organized her government as a sovereign state in 1776. This territory, in addition to being Virginia's by charter rights, became hers also by conquest, since it was conquered from the British by Virginia troops, commissioned by the Governor and Council of Virginia. The expenses incurred by these troops in this conquest were paid out of the treasury of this Commonwealth. Virginia was in actual possession and control of this territory until her cession to the Federal government and the ac-

ceptance of her cession by the Federal government. Prior to this cession this territory was organized as the county of Illinois, and held as a part of the State. Thus, by charter rights, by conquest and by actual possession, this territory ceded constituted a part of Virginia. The fact that the United States government derived title to this vast territory by cession and deed of conveyance made by Virginia to the United States government has been clearly and distinctly recognized by the Supreme Court of the United States in the case of HANDLEY'S LESSEE v. ANTHONY, 5th Wheaton, page 374. In this case, the opinion of which was rendered by Chief Justice Marshall, the court decided, in fixing the boundary lines between the State of Kentucky and the State of Indiana, that the boundary line of Indiana must be determined by the cession made by the State of Virginia to the United States Government and the terms and limitations contained in that cession, since the title of the United States to the territory was derived from this cession of the State of Virginia. The opinion of this court was further sustained by the General Court of Virginia in the case of COMMONWEALTH v. GARNER, 3d Grattan, page 655. Thus the prior rights of Virginia to this territory have been judicially determined.

In the act of Virginia making the cession of this large territory to the United States and in the deed of conveyance in pursuance of the act of the General Assembly executed by her representatives in the Continental Congress, Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, according to her directions, were contained certain conditions,

which conditions the Federal Government accepted. Among the conditions thus enumerated and accepted by the Federal government was the following:

> "That all the land within the territory so ceded to the United States and not reserved or appropriated to any of the before mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation or Federal Alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose and for no other use or purpose whatsoever."

The United States government, through Congress, has uniformly recognized that this territory ceded was derived from Virginia, and that she was bound by the conditions contained in the act of cession. Desirous of changing some of the conditions contained in the act of cession regarding the establishment of new States in the ceded territory, she requested Virginia to make some alterations in these conditions, which Virginia consented to, permitting the creation of States different from the original cession. By requesting Virginia to make this change Congress recognized that she had no right even in the creation of States in this territory to alter the terms of the original act of conveyance without the

consent of the State of Virginia.

Out of this territory ceded by Virginia were formed the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota. The United States received by this cession 170,208,623 acres of land. Of this land some was appropriated to comply with the conditions contained in the act of cession accepted, other than the one above stated. The largest portion of it was sold and paid into the treasury of the United States and used in payment of the public debt and in the payment of Federal expenditures. It may possibly be contended that this portion was, under the terms of the cession used for the benefit of all States, as contained in the cession made by Virginia. But, contrary to the expressed conditions contained in the act of cession, Congress at different times, in the aggregate, appropriated 38,868,212 acres of land, and $2,953,654.70, derived from the sale of these public lands, entirely to local uses within these six states. These amounts of land and money were appropriated for local school purposes, construction of canals, improvement of local roads and other purposes within these States, entirely local. Thus it appears that more than one-fifth of the lands ceded by Virginia under definite provisions and conditions, reserving to Virginia an interest in them, has been disposed of in ways that have given no "use and benefit" to Virginia, as distinctly reserved for her in her act of cession. At the time that Virginia ceded her western territory to the United States, Virginia's proportion in the general charge and expenditure was about one-seventh of the whole, and thus her reserved interest in the lands not specifically applied for the purposes stated in

the deed of concession was about one-seventh. The value of this land donated to local uses (amounting to 38,868,212 acres), computed at $2.00 per acre, which was the price fixed by Congress when it was first offered for sale, would be $77,736,424.00. This, added to the amount of money appropriated of $2,958,654.00, would make the total value of the donation for local purposes, clearly contrary to the terms and provisions of cession, amount to $80,695,078.00. Subject to such claims as might exist in behalf of Kentucky and West Virginia, which were then a part of Virginia, Virginia has a right to demand of the Federal government her part of these lands and money, which Congress appropriated entirely to local uses and for which Virginia received no benefit.

The full statement of Dr. Fulton, which I file with this message, indicates other large and fair claims of Virginia, which the limit necessarily given to this message precludes me from mentioning. Though reserving to herself a fair share of the use and benefits to be derived from these many millions of acres of land, it appears that Virginia has never received an acre of land nor a cent of money from this source. The federal government accepted by resolution this cession of Virginia containing these conditions, and is bound in law and equity to discharge the obligations of the compact made with Virginia. The United States has fully recognized her obligations to comply with all the conditions imposed in the Virginia conveyance, and cession, by fulfilling all except the one reserving to Virginia a share in the use and benefits of all these lands. Vir-

ginia should insist that this should be complied with. As a party to the compact she is the proper party to make this demand.

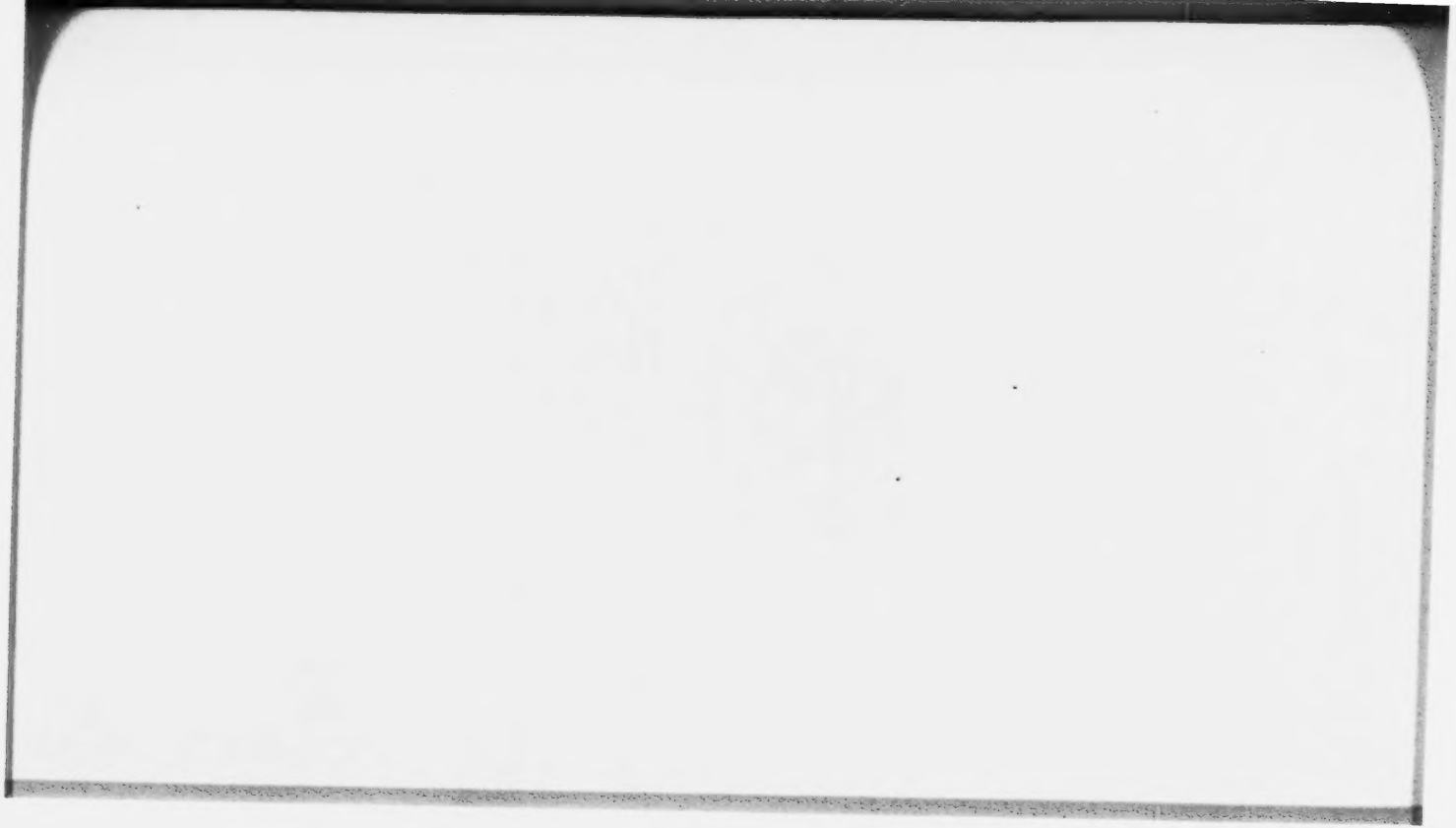
I commend to your most careful consideration the very valuable and interesting history of this transaction and the claims of the State of Virginia upon the Federal government, which has been so industriously and carefully compiled by Dr. Fulton. I have had no opportunity to make a careful personal examination of the statements contained in the documents submitted to me, hence I recommend that the General Assembly of Virginia refer this matter to an appropriate committee for examination and report. If the conclusions reached by that committee concur with those contained in the statements and facts presented herewith, I then recommend that the General Assembly authorize her representatives in Congress to take such action as they may think proper to have this claim of Virginia against the Federal government fairly and justly settled, and that the Attorney-General of this State be directed to co-operate with them and to take such action as he may think the best interest of Virginia demands.

I transmit with this message a full statement of the facts and conclusions obtained by Dr. Fulton in his research and investigation, with letters from Superintendent Eggleston and Dr. Fulton.

Respectfully submitted,

CLAUDE A. SWANSON,
Governor.

—Senate Journal & Documents, Va. 1910.



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# Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia, Defendants.

## WEST VIRGINIA'S BRIEF IN SUPPORT OF HER MOTION TO DISCHARGE THE RULE IN MANDAMUS HEREIN.

E. T. ENGLAND,
Attorney General of West Virginia.
JOHN H. HOLT,
Special Counsel for State of West Virginia.

March 5, 1917.

# Supreme of Court the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia, Defendants.

## WEST VIRGINIA'S BRIEF IN SUPPORT OF HER MOTION TO DISCHARGE THE RULE IN MANDAMUS HEREIN.

### STATEMENT OF CASE.

On the 14th day of June, 1915, this Court, in the exercise of its original jurisdiction under Sec. 2 of Art. 3 of the Constitution, entered a judgment in favor of the Commonwealth of Virginia against the State of West Virginia for the sum of $12,393,929.50. with interest thereon from July 1, 1915, until paid at the rate of 5% per annum.

On June 5, 1916, the Commonwealth of Virginia, after notice given, moved for a writ of execution

upon said judgment; but the writ was denied, upon the ground that the application therefor was premature, in consequence of the fact that the Legislature of the State of West Virginia had not met since the rendition of the judgment, and it had had no opportunity to provide for the payment of the debt.

Commonwealth of Virginia v. State of West Virginia, 241 U. S., 531.

Subsequently, that is to say, upon the 10th day of January, 1917, the West Virginia Legislature convened in regular biennial session, and, while still in session, and before the adjournment thereof, the Commonwealth of Virginia applied for and obtained leave to file a petition for a writ of mandamus against the State of West Virginia and the individual members of both branches of her Legislature, commanding the Legislature of said State to provide for the payment of said judgment by a levy of taxes or through the medium of a bond issue.

The petition was received, and, on the 5th of February, 1917, a rule in mandamus was issued, commanding the Honorable Wells Goodykoontz, President of the West Virginia Senate, and the other members of that body, as well as the Honorable Joseph S. Thurmond, Speaker of the House of Delegates of the State of West Virginia, and the other members of that House, to show cause before this Court on the 6th day of March, 1917, "why a writ of mandamus should not issue against them as prayed in said petition".

The rule was served upon the individual members of the Legislature upon the 23rd day of February, 1917, and, by a joint resolution on that day

passed, the Attorney General of the State and special counsel were authorized and directed to appear and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof and the several Senators and Delegates constituting the membership of said Legislature.

Upon the return day of the rule, and pursuant to the resolution aforesaid, the Attorney General of the State and special counsel retained for the purpose appeared on behalf of the respondents, and filed a motion to discharge the rule.

## GROUNDS OF THE MOTION TO DISCHARGE.

The grounds of the motion to discharge are assigned as follows:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.

4. It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.

5. Sec. 8 of Art. 8 of the West Virginia Constitution of 1863 imposed no ministerial duties upon the Legislature of the State, but only judicial and legislative duties.

6. Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.

## ARGUMENT.

1. *A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.*

That Amendment reads:

> "10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

The power of laying taxes for State purposes has not been "delegated to the United States by the Constitution, nor prohibited by it to the States", and, in

consequence, this power has been "reserved to the States". It was never contemplated that the States would lay levies for national purposes, or that the Federal Government would lay them for State purposes. On the contrary, we have, under the Constitution, two distinct powers of taxation, the one for federal, and the other for State purposes; and it is exercised, in the one case, exclusively by the federal government, and, in the other, by the State. Neither may encroach upon the other, but each must turn upon its own separate axis, and revolve in its particular orbit. Otherwise, there would be an irreconcilable conflict between an indestructible Union, upon the one hand, and equally indestructible States, upon the other. It is true that one State may not destroy the Union, but it is equally true that the Union may not destroy one State. In addition to this, the power of taxation in each government is lodged in the legislative department thereof, and may not be exercised by the judicial department of either government, or in any case.

What, then, is the character and the purpose of the particular tax that it would be sought to levy by the writ of mandamus prayed? Clearly it is a State tax, to be devoted exclusively to a State purpose; that is to say, to the payment of a State debt, and is such a tax as may be authorized, in consequence of the Tenth amendment, only by the State government. It involves one of the expressly reserved sovereignties of the State, and this express reservation may not be overturned by an antecedent implication that the power to decide necessarily embraces the power to execute. The conclusion, therefore, would seem to be irresistible that the Federal Government cannot,

through its judicial or any other department, coerce a State in the exercise of its reserved powers by compelling the legislature thereof to exercise such powers contrary to its discretion, and in opposition to its will. The existence and exercise of such a power would overturn the Tenth Amendment, and make serious inroads upon the fundamental rights of the States. In other words, the provision contained in Sec. 2 of Article III, of the Constitution, giving the Supreme Court original jurisdiction "in all cases * * * in which a State shall be a party", if it should have added to it, by inference or argument, and as an incident to such jurisdiction, the power to enforce a judgment rendered in any such case through the medium of a writ of mandamus controlling the legislative action of a State in respect to its reserved powers, would render the subsequently adopted Tenth Amendment abortive.

In the case of South Dakota v. North Carolina, 192 U. S., 286 (48 L. ed., 448), Mr. Justice Brewer, in delivering the majority opinion of the Court, speaks of "the absolute inability of a court to compel a levy of taxes by the legislature"; and the foregoing conclusion is further strengthened by the opinions of this Court, speaking through Mr. Justice Miller, in the cases of Heine v. Board of Levee Comrs., 19 Wall., 655, and Rees v. Watertown, 19 Wall., 107. In the first case, he makes use of the following language:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In

the case before us, the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the Court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

And, in the second, he says:

"We are of the opinion that this Court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only, and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

To like effect is the case of Meriwether v. Garrett, 102 U. S., 472, decided by this Court in 1880, wherein Mr. Justice Field, in delivering a concurring opinion for himself, Mr. Justice Miller and Mr. Justice Bradley, made use of the following language:

> "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.
>
> It is the province of the Courts to decide causes between parties, and, in so doing, to construe the Constitution and the Statutes of the United States and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department

within its own proper sphere was designed by the founders of our government, and is essential to its successful administration."

Page 515.

Continuing, he further says:

"These authorities, and many others to the same purport might be cited, are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it.

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the Legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been obolished and the power withdrawn, the remedy of the creditors is by an appeal to the Legislature, which alone can give them relief. No Federal Court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal Court, it cannot seize the power which belongs to the leg-

islative department of the State and wield it in their behalf."

Pages 517 & 518.

The reasoning of this Court in *ex parte* Kentucky v. Dennison, 24 How., 66; 16 L.ed., 717, is analogous. There paragraph two of Sec. 2 of Art. IV. of the Federal Constitution, requiring the executive authority of one State to deliver up on demand fugitives from justice, and the Act of Congress of 1793, providing the regulations necessary to the execution of such constitutional provision, were construed, and the extent of their force defined. One Willis Lago, indicted in the State of Kentucky for a crime under the laws of that State, fled into the State of Ohio, and a requisition issued by the Governor of Kentucky, under the constitutional provision and Act of Congress aforesaid, upon the Governor of Ohio for his return was denied. Thereupon, the State of Kentucky instituted a mandamus proceeding in the Supreme Court of the United States against the Governor of Ohio, asking that the latter be compelled to obey the requisition; and, although this Court assumed jurisdiction, and held that mandamus was the proper proceeding, if there were any remedy at all applicable to the controversy, it denied the writ, upon the ground that the constitutional provision and the Act of Congress aforesaid only appealed to the moral duty and fidelity of the States, and did not provide "any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms

the Government of the United States with this power"; and Mr. Chief Justice Taney, who delivered the opinion of the Court, concluded the same with the following language:

> "And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty'.
>
> But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him.
>
> And upon this ground the motion for the mandamus must be overruled."

See also Carter v. State, 42 La. Ann., 927; 21 Am. St. Rep. 404.

2. *The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.*

Jurisdiction to hear and determine may, and does ordinarily, include the power to enforce (or rather the power to issue proper writs for the enforcement of a judgment); but mandamus cannot, under the Constitution, become a substitute for a writ of execution upon a judgment against a State. Execution may be issued upon a judgment regularly rendered against a State, and be levied upon any property owned by the State, and not devoted to political or governmental purposes, and, if no such property be found, the writ must be returned *nulla bona*, and the end of the law has been reached, because, as we have seen, the legislative department of a State may not be coerced, under the Constitution; and there is nothing remarkable in this situation, because frequently judgments are rendered and executions issued thereon which are returned *nulla bona*, and all legal remedies thereby exhausted. The Courts can only give suitors the proper process, original and final, and, if these fail to satisfy the creditor's claim, there is no fault in the judiciary. In other words, jurisdiction does not include or imply the collection or satisfaction of a debt, but only means the power to hear and determine, and to render judgment therefor and issue proper process thereon.

The cases cited by counsel for Virginia at page three of their brief (Supervisors v. U. S. etc.) are beside the question, do not meet the situation, and throw no light whatever upon it. We will notice each briefly.

In the case of Supervisors v. U. S., 4 Wall., 435; 18 L.ed., 419, the County of Rock Island, in the State of Illinois, pursuant to the authority of the Legisla-

ture of that State, subscribed for stock in the Warsaw & Rockford R. R. Co., and issued and negotiated in payment thereof certain coupon bonds of the County. The earlier coupons were paid, but the County finally defaulted. Thereupon, the holder of the bonds instituted an action in the Circuit Court of the United States for the Northern District of Illinois upon the overdue and unpaid coupons, and recovered a judgment for $2,554.60 and costs The County failed and declined to pay this judgment, and mandamus was resorted to by the judgment creditor to compel the County Supervisors, under the Illinois statute, to levy a tax for its satisfaction. The Circuit Court in regular course awarded a peremptory writ of mandamus, and to this judgment the County Supervisors prosecuted a writ of error to the Supreme Court. The contention here was that the Act of the Legislature of the State of Illinois of February 16, 1863, authorizing the Board of Supervisors in such Counties as might owe debts which their current revenue was insufficient to meet to levy a tax for the purpose of liquidating such indebtedness, conferred only a discretionary power upon the Supervisors, which could not be controlled by mandamus; but this Court held that the statute was mandatory, and, in consequence, affirmed the judgment in mandamus of the Court below. In other words, the State was not a party, and the writ was not directed to the Legislature thereof. Indeed, the Legislature had already acted. It had authorized the issuance of the bonds and the levy of a tax for their payment, and had appointed the County Supervisors as its agents for the execution of its mandates.

Under such circumstances, there was no invasion of sovereignty, or coercion of legislative action. On the contrary, it was the enforcement of ministerial acts already authorized and directed by legislative authority.

Von Hoffman v. City of Quincy, 4 Wall., 535; 18 L.ed., 403, simply presents a case where a municipality, under the authority of the legislature, issued bonds, with the power of local taxation necessary to pay the same, and, after the indebtedness had been so incurred, the legislature, by subsequent action, undertook to repeal its former law, thereby impairing the obligation of a contract, which it was held it could not do under the Constitution, and mandamus went to its county agents compelling them to levy the necessary tax to pay the bonds issued under the original law.

The City of Galena v. Am, 5 Wall., 705; 18 L.ed., 560, practically decides both questions involved in the two preceding cases, viz., that an Act authorizing a municipality to levy an annual tax to be paid on its debt is imperative, and that bonds once issued under the authority and direction of a legislative enactment may not be impaired by a subsequent repeal of that Act. Here again, as before, the Legislature had acted, and had named the agents for the execution of what it had authorized, and these agents were subject to mandamus compelling them to perform their imperative ministerial duties.

Riggs v. Johnson County, 6 Wall., 166; 18 L.ed., 768, was likewise an application to the Circuit Court of the United States for a mandamus to compel the supervisors of Johnson County, Iowa, to levy a tax

for the payment of a judgment rendered by the Circuit Court against said County on account of overdue and unpaid interest on certain of its bonds theretofore issued in aid of railroad construction under certain Acts of the State Legislature, which mandamus was refused by the Circuit Court; but its judgment was reversed upon writ of error by this Court, and the writ directed. The same principles were applied as in the preceding cases, and there was nothing new for consideratiton, except the County made return to the alternative writ that it had been enjoined by the State Court from levying the tax in question, and would be in contempt if it were to do so under mandate from the Federal Court. This was held to be no defense. Again the State was not a party, and its Legislature was neither requested nor compelled to do anything. It had already acted, and the judgment of this Court simply operated upon the State's agents, and required them to perform certain mandatory duties previously laid upon them by legislative action. Walkley v. City of Muscatine, 6 Wall., 481; 18 L.ed., 930, simply holds that in cases like the above, and after a return of *nulla bona*, a bill in equity will not lie to compel the levying of a tax for the payment of a judgment, but that mandamus is the proper remedy. The decision has nothing to do with the present controversy.

Labette County Comrs. v. Moulton, 112 U. S., 217; 28 L. ed., 698, is to the same effect.

3. *Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.*

At common law, Parliament never was, and could not be, coerced by the writ of mandamus.

People v. Morton, 156 N. Y., 136.

And, in this country, the same principles and usages have always obtained.

Ex parte Echols, 39 Ala., 698.
State v. Bolte, 151 Mo., 362.

Certainly such is true with respect to the mandamus of State Legislatures by State Courts, and there is no case on record where this Court has ever addressed a writ of this character to the law-making power of a State.

4. *It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.*

We are not unmindful of the dangers and difficulties of analogy; but, if this were the case of an individual judgment debtor, it is plain that, after a writ of excution had gone against him and been returned *nulla bona*, and after it had been ascertained, in addition thereto, that he had no real estate out of which to satisfy the judgment, although he might have great earning capacity, no one would contend that the exercise thereof might be compelled by the

writ of mandamus. He might be able to sing or dance, and even be bound by contract to do both, and yet he would not be compelled to do either.

Lumley v. Wagner, 1 De G., M. & G., 604.

It may be answered that a fund was created by mandamus for the payment of a debt in the case of Supervisors v. U. S., 4 Wall., 435, *supra*, and like cases hereinbefore reviewed; but it will be observed that in each of those cases all necessary legislative action had theretofore been had, and the proper ministerial agents appointed for the effectuation thereof; so that nothing was left to be done except to have resort either to the State or Federal Courts (for both had jurisdiction in the cases referred to) for a writ of mandamus to compel the performance of a purely ministerial act; made mandatory by the act of the only branch of government having any discretion in the premises.

5. *Sec. 8 of Art. 8 of the West Virginia Constitution of 1863 imposed no ministerial duties upon the Legislature of the State, but only judicial and legislative duties.*

This constitutional provision reads as follows:

"8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand, eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same

> as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

And the contention of Virginia is that, by reason of these terms, "the Legislature of West Virginia is under an express constitutional obligation to provide for the payment of the amount ascertained by the Court to be due by West Virginia * * *," and that "it is clearly within the power of the Court to compel the Legislature of West Virginia, in conformity with this constitutional requirement, to make provision for the payment of the decree and judgment, which represent the ascertained equitable proportion of the Virginia debt assumed by West Virginia" (brief of counsel for relator, pages 7 & 8).

But it would seem that that portion of the constitutional provision declaring that "the Legislature shall ascertain the same" (the equitable proportion of the debt to be paid) "as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years" is no part of the contract. Otherwise, this Court would have had no jurisdiction to ascertain West Virginia's equitable proportion of the debt, because, if effect were given to the portion of the constitutional provision relied upon, the West Virginia Legislature would have had the exclusive right to ascertain such amount; but this Court has held otherwise. It says in the case of Virginia v. West Vir-

ginia, 220 U. S., page 1, that —

> "The provision in the Constitution of the State of West Virginia that the Legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouth-piece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be, and an indication of the way."

Certain it is that one-half of the constitutional provision last quoted has been stricken from the contract, and the power to ascertain the amount taken out of the hands of the Legislature and assumed by the Court, and that too for the reason that, "apart from the language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in no wise beyond the competence of a tribunal to decide." And, if that be true, the residue of the provision, even if it should be permitted to stand and be given full force, would be left as a legislative function, over which the judiciary would have no control.

We come right back, therefore, to the question whether or not this Court can or will interfere by mandamus to coerce the action of a State Legislature in the performance of purely legislative functions within its exclusive jurisdiction, and this, it is submitted, this Court will not do, for the same reason, among others, that it refused in the case of

Louisiana v. Jumel, 107 U. S., 711; 27 L. ed., 448, to oust the political power of the State of Louisiana of its jurisdiction, and set the judiciary in its place; and it is no answer to say that the present case is distinguishable from that of United States v. Jumel, in that there the State made no appearance, while West Virginia has here appeared and submitted herself to the jurisdiction; because wherever jurisdiction is conferred and process is regularly issued and served, as in this case, it makes no difference whether the defendant appears or not, because the defendant is before the Court anyhow, and a judgment by default could be rendered, which would be just as binding as one upon appearance. The appearance, in other words, has nothing to do in the case of a State by way of giving consent to be sued, because that consent was given long ago by the adoption of the Federal Constitution in 1789.

It should be further observed in this connection and as bearing upon the constitutional provision referred to, that the petition prays for a mandamus commanding "the Legislature to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment * * * * unless the Legislature shall * * * make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash." This not only illustrates but actually invokes, the discretion of the Legislature, and does not at that embody all of its discretionary power when measured by the constitutional provision invoked. The Legislature could perhaps,

under the State Constitution, either (1) lay a tax upon all property, real and personal, within the State, to be collected at once, sufficient to pay the judgment, or (2) it might, under that Constitution, distribute the tax over a period of years, or (3) it might resort to a bond issue, which would be governed either by Sec. 8 of Art. 8 of the Constitution of 1863, or by Sec. 4 of Art. 10 of the present Constitution, which reads as follows:

> "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

If under the former, a sinking fund would have to be provided "sufficient to pay the accruing interest and redeem the principal within thirty-four years"; that is to say, the period of payment might be short or long, either one year or thirty-four, within the discretion of the Legislature. And if under the latter, payment would have to be "equally distributed over a period of at least twenty years"; that is to say, the annual contributions to the sinking fund would have to be equal for a period of twenty years or more, again at the discretion of the Legislature.

In any event, the wide discretion of the Legislature is illustrated; and it should be further borne in

mind that that body is composed of two Houses, one of which might deem its discretionary duty to lie in one direction, and the other in another direction, and yet the two must concur in order to lay a levy or issue bonds.

If these things be true, the discretion of the Legislature becomes apparent, and that discretion will not be controlled by mandamus.

6. *Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.*

While the writ of mandamus is no longer prerogative, yet it is highly extraordinary, and its issuance is at the sound discretion of the Court.

Re Key, 189 U. S., 85.
Life & Fire Ins. Co. of N. Y. v. Wilson, 8 Peters, 291; 8 L. ed., 949.
State v. Buchanan, 24 W. Va., 362.
State v. Melton, 62 W. Va., 253.
Cyc., Vol. 26, pages 143-6.

The matter set up in the return of the respondents relative to the cession of the northwest territory is an appeal to this Court to exercise its discretion against the issuance of the writ herein, under all the circumstances.

Respectfully submitted,

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